87-292

Supreme Court, U.S.
FILED
AUG 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO.

in the Supreme Court of the United States

UMBERTO DEL RIVO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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5 HPP

QUESTION PRESENTED FOR REVIEW

WHETHER AN ORDER DENYING A COLORABLE CLAIM TO DISMISS AN INDICTMENT FOR VIOLATION OF A PLEA AGREEMENT NOT TO PROSECUTE IS APPEALABLE PRIOR TO TRIAL.

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JUDGMENT AND OPINION OF THE COURT BELOW

On May 18, 1987, the United States Court of Appeals for the Sixth Circuit filed an opinion affirming the denial of the petitioner's motion to dismiss an Ohio indictment. App. 3-6. On July 1, 1987, the Sixth Circuit entered an order denying the timely filed Petition for Rehearing and Suggestion for Rehearing En Banc. App. 7.

JURISDICTION OF THIS COURT

This Petition is filed within sixty days of July 1, 1987, when the Court of Appeals denied the Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc.

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C., Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

STATUTORY PROVISION INVOLVED

Title 28, United States Code, Section 1291, provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, The District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

In June, 1984, the petitioner was indicted in the Eastern District of Louisiana for conspiracy to possess with intent to distribute marijuana and possession of marijuana with intent to distribute. App. 4. The conspiracy charge encompassed events from June, 1979, through November 1979, and alleged that the coconspirators were James Hager and "others". The government's bill of particulars indicated that the conspiracy took place in Ohio, as well as Louisiana. App. 4, 37.

The petitioner entered into a plea agreement with the United States Attorney in Louisiana pursuant to which the government dismissed the indictment in exchange for the petitioner's cooperation and his plea of guilty to accessory after the fact. Additionally, the government drafted a letter in which it agreed not to prosecute the petitioner for "any other narcotics violations or criminal tax violations which occurred in

the Eastern District of Louisiana", but reserved the right to proceed against the petitioner civilly. App. 33-36.

In 1985, the petitioner was indicted in Ohio for conspiracy to possess marijuana with intent to distribute and criminal tax evasion. The petitioner sought dismissal based upon the prior plea agreement. App. 23-32.

An evidentiary hearing was held before the district judge, following which an order was entered denying the motion to dismiss. App. 8-15. Thereafter, an order was entered denying the petitioner's motion for reconsideration. App. 16-19.

The petitioner appealed to the Sixth Circuit, but the merits were not reached because the court held "the alleged violation of a plea agreement in a criminal case does not fall within any of the exceptions to the final judgments rule." App. 6. The court ruled that Del Rivo would first have to face trial on the Ohio charges and if convicted, allege on appeal that the prosecution had been barred by the plea agreement. App. 5.

REASONS FOR GRANTING THE WRIT

Denial of a motion to dismiss based upon a colorable claim that a prosecution is violative of a plea agreement not to prosecute is reviewable prior to trial in the Second Circuit *United States v. Abbamonte,* 759 F.2d 1065 (2d Cir. 1985). In the decision sought to be reviewed, the Sixth Circuit reached a contrary conclusion. Other circuits that have addressed the issue have also deemed

pretrial review unavailable. *United States v. Bird,* 709 F.2d 388 (5th Cir. 1983); *United States v. Brizendine,* 659 F.2d 215 (D.C. Cir. 1981); *United States v. Eggert,* 624 F.2d 973 (10th Cir. 1980); *United States v. Solano,* 605 F.2d 1141 (9th Cir. 1979). Review by this Court would resolve a conflict that strikes at the heart of the integrity of the plea bargaining system because the ruling below insulates from pretrial review a violation of a governmental promise not to prosecute.

Resolution of the conflict turns upon interpretation of the final judgment rule embodied in 28 U.S.C. §1291, which bars interlocutory appeals in all but a small class of orders "which finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole cause is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949). To fall within this narrow exception, the order "[f]irst, 'must conclusively determine the disputed question'; second, it must 'resolve an important issue completely separate from the merits of the action'; third, it must 'be effectively unreviewable on appeal from a final judgment.' " *Flanagan v. United States,* 465 U.S. 259, 265, 104 S.Ct. 1051, 1055, 79 L.Ed.2d 288 (1984) (*quoting Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468, 98 S.Ct. 2425, 2457, 57 L.Ed.2d 351 (1978)).

In criminal cases, the collateral-order exception has been interpreted with the "utmost strictness" because of the "compelling interest in prompt trials." *Flanagan v. United States,* 465 U.S., at 265, 104 S.Ct., at 1055.

Three types of pretrial orders in criminal cases have been found to meet the requirements of the exception: orders denying motions to reduce bail, *Stack v. Boyle,* 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 1 (1951); orders denying motions to dismiss an indictment on speech or debate grounds, *Helstoski v. Meanor,* 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979); and orders denying motions to dismiss an indictment on double jeopardy grounds, *Abney v. United States,* 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). The latter two types of orders are immediately appealable for the following reasons:

> Such orders finally resolve issues that are separate from guilt or innocence, and appellate review must occur before trial to be fully effective. The right guaranteed by the Double Jeopardy Clause is more than the right not to be convicted in a second prosecution for an offense: it is the right not be be "placed in jeopardy"—that is, not to be tried for the offense. Similarly, the right guaranteed by the Speech or Debate Clause is more than the right not to be convicted for certain legislative activities: it is the right not to "be questioned" about them—that is, not to be tried for them. Refusals to dismiss an indictment for violation of the Double Jeopardy Clause or of the Speech or Debate Clause, like denials of bail reduction, are truly final and collateral, and the asserted rights would be irretrievably lost if review were postponed until trial is completed.

Flanagan v. United States, 465 U.S., at 266, 104 S.Ct. at 1055.

Similarly here, the petitioner has alleged a colorable right not to be tried on the ground that the prior plea agreement barred the charging in Ohio of the same conspiracy which the government dismissed in Louisiana in exchange for the petitioner's cooperation and guilty plea to another offense. There is no question that the petitioner fulfilled his obligations under the agreement. Accordingly, if the petitioner's allegations are correct, he had a right not to be tried, which will be lost forever if not protected through pretrial review. The same considerations apply to the criminal tax charges filed in Ohio. If indeed they are barred by the plea agreement, then the petitioner's right is more than the right not to be convicted; it is the right not to be tried on those charges.

The Second Circuit has ruled that orders denying motions to dismiss based upon plea agreements not to prosecute are immediately appealable. In *United States v. Alessi,* 536 F.2d 978 (2d Cir.), *cert. denied,* 429 U.S. 960, 97 S.Ct. 384, 50 L.Ed.2d 327 (1976), the court held that an order denying dismissal of an indictment and rejecting a claim that trial was barred by a prior plea agreement was appealable prior to trial. In 1985, the court revisited the issue in *United States v. Abbamonte, supra.* Recognizing that this Court had made clear that *Abney* did "not permit an interlocutory appeal from every pretrial ruling that would end a criminal proceeding if decided in defendant's favor", 759 F.2d at 1071, citing, for example, *United States v. MacDonald,* 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978) (rejecting an interlocutory appeal from an order denying dismissal of an indictment challenged on speedy trial grounds), and *United States v. Hollywood Motor Car Co.,*

458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982) (rejecting an interlocutory appeal from an order denying dismissal of an indictment challenged on grounds of vindictive prosecution), the Second Circuit nevertheless found that its holding in *Alessi* had remained consistent with subsequent decisions of this Court:

> [T]here is considerable force to appellants' argument that a plea agreement barring prosecution on related charges is intended to preclude trial, not merely conviction, on such charges. Indeed, it is arguable that the whole point of including such a provision in a plea agreement is not simply to restate the protection that the Double Jeopardy Clause would provide in any event, but to secure the added benefits, first, of avoiding the need to litigate whether the elusive standards of the Double Jeopardy Clause have been exceeded and, second, of securing broader insulation than the Clause provides. We are satisfied that an order denying a colorable claim to dismiss an indictment for violation of a prior plea agreement remains appealable in this Circuit.

Id. at 1071.

In the decision sought to be reviewed, the Sixth Circuit relied upon its prior decision in *John Doe Corp. v. United States,* 714 F.2d 604 (6th Cir. 1983), which rejected the reasoning of the Second Circuit as follows:

> We decline to follow *Alessi* but rather embrace the reasoning of the Tenth Circuit in *United States v. Eggert.* In a situation nearly identical to the present case, the district court denied Eggert's motion to dismiss the indictment on the basis of a prior plea agreement and the Tenth Circuit deemed the pretrial order unappealable. The court found that the appellant had not demonstrated a due process interest sufficient to justify piecemeal review of the criminal action. In the present case we also find no due process interest sufficient to justify an exception to that final judgments rule. *** The [defendant] will not lose the protection, if any, afforded it by the plea agreement if review is deferred. Should the defendant be convicted under the present indictment, we will have the opportunity to review the scope of the plea agreement and order appropriate relief.

John Doe, 714 F.2d at 606.

The Sixth Circuit's holding that a promise by the government not to prosecute carries no due process interest sufficient to warrant pretrial review runs counter to the due process guarantee that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York,* 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). Thus, this cause bears directly upon the integrity of the plea bargaining process.

Ironically, by declining to review these claims prior to trial, those circuits in conflict with the Second Circuit might not effect their apparent goals of expediting criminal cases and reducing their pretrial criminal appellate dockets. Rather, defendants in those circuits may be forced to re-frame their claims into more elusive and complex double jeopardy claims.

Regardless, an order denying a claimed due process right not to be tried pursuant to a plea agreement between the government and the accused meets the criteria for immediate appealability. This Court is urged to resolve this exceptionally important jurisdictional issue.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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August, 1987

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[FILED MAY 18 1987]

No. 86-3566

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

UMBERTO DEL RIVO,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

Before: MARTIN and MILBURN, Circuit Judges; and BROWN, Senior Circuit Judge.

PER CURIAM. Umberto Del Rivo appeals the denial of his motion to dismiss an Ohio indictment charging him with conspiracy to possess marijuana with intent to distribute and criminal tax evasion. Del Rivo alleges that the Ohio indictment for conspiracy violates the "double jeopardy clause" based on his plea bargain of an earlier indictment in Louisiana. He also argues that the charges for tax evasion violate his Louisiana plea agreement. For the reasons stated below we find no double jeopardy violation. We also find we lack

jurisdiction to review his plea agreement. We therefore affirm the judgment of the district court.

Umberto Del Rivo was indicted by a federal grand jury in the Eastern District of Louisiana on June 14, 1984. He was charged with one count of conspiracy to possess with intent to distribute approximately 15,000 pounds of marijuana and one count of possession of marijuana with intent to distribute. The only other person named in this indictment was James Frederick Hager though the conspiracy count referred to "diverse other persons, known and unknown to the Grand Jury." The conspiracy count listed a period of time from June 1, 1979, through November 30, 1979. The location was the "Eastern District of Louisiana and elsewhere."

On October 17, 1984, Del Rivo entered into a plea agreement with the Louisiana United States Attorney. He agreed to plead guilty to an "accessory after the fact" charge and to undergo a "debriefing" in exchange for dismissal of the conspiracy and possession charges. Because these charges were dismissed, jeopardy never attached to the conspiracy charge. "The state of jeopardy attaches when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence." *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 569 (1977) (citing *Illinois v. Somerville,* 410 U.S. 458, 471 (1973) (White, J., dissenting)).

Though it might seem unjust that a defendant has no double jeopardy defense in a plea bargaining situation, courts have held that defendants have other remedies available to protect them if a plea bargain has been breached by a prosecutor. " '[S]ufficient

constitutional and statutory measures protect defendants in cases that might be tainted by an overzealous prosecutor abusing the rules marking the attachment of jeopardy to make abandonment of those rules unnecessary' where a previous indictment ha[s] been dismissed at the government's request." *United States v. Stricklin,* 591 F.2d 1112, 1120 (5th Cir.), *cert. denied,* 444 U.S. 963 (1979) (quoting *United States v. Pitts,* 569 F.2d 343, 347 n. 5 (5th Cir.), *cert. denied,* 436 U.S. 959 (1978)). In *Stricklin* the defendant was protected by his Sixth Amendment right to a speedy trial. Here, as we will now discuss, the defendant may allege breach of a plea agreement once he has been tried on the Ohio charges.

Del Rivo next argues that his Ohio indictment for criminal tax evasion violates his Louisiana plea agreement. We dismiss this claim for lack of jurisdiction. United States Code Title 28 §1291 gives us jurisdiction to hear appeals from all final decisions of the district courts. In this case Del Rivo's Louisiana plea agreement does not constitute a final and appealable order.

The Supreme Court has identified very few exceptions to the final judgments rule, allowing them only for the appeal of "rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Loan Corp.,* 337 U.S. 541, 546 (1949) (cited in *John Doe Corp. v. United States,* 714 F.2d 604, 606 (6th Cir. 1983)). The most well-recognized exception occurs in the case of double jeopardy where the right would be forever lost if a defendant were forced to stand

trial for the same offense. *John Doe Corp.*, 714 F.2d 604, 606 (citing *Abney v. United States*, 431 U.S. 651 (1977)). However, other non-appealable claims are not rendered appealable by joining them with a double jeopardy claim. *United States v. MacDonald*, 435 U.S. 850, 857 n. 6 (1978).

This claim, based on the alleged violation of a plea agreement in a criminal case, does not fall within any of the exceptions to the final judgments rule. *John Doe Corp.* is controlling, and we decline to exercise jurisdiction over this appeal which amounts to an interlocutory appeal from a criminal pretrial order, 714 F.2d 604, 606.

The judgment of the district court is affirmed.

[FILED JUL 01 1987]

No. 86-3566

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

UMBERTO DEL RIVO,
Defendant-Appellant

O R D E R

BEFORE: MARTIN and MILBURN, Circuit Judges, and BROWN, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

John P. Hehman, Clerk

[FILED JUN 2 1986]

UNITED STATES DISTRICT COURT
SOUTHERN OHIO DISTRICT
EASTERN DIVISION

Case No. CR-2-85-136(2)

UNITED STATES OF AMERICA,

Plaintiff,

v.

UMBERTO DEL RIVO,

Defendant.

OPINION AND ORDER

This matter comes before the Court to consider defendant Umberto Del Rivo's motion to dismiss the indictment against him on the grounds of double jeopardy and violation of the plea agreement. On May 6, 1986, the Court held an evidentiary hearing to develop the facts surrounding the defendant's motion.

Count 1 of the indictment charges the defendant with conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) while Counts 13, 15, and 16 charge him with violations of and conspiracy to violate federal income tax laws.

The defendant contends that Count 1 of the indictment must be dismissed because he already has been charged with the same conspiracy to possess marijuana with intent to distribute in the Eastern District of Louisiana on June 14, 1984. The Court finds no merit to the defendant's argument.

First, the Court notes that although Del Rivo was initially indicted in the Eastern District of Louisiana on one count of conspiracy to possess marijuana with intent to distribute, he pled guilty to a superseding bill of information charging him with being an accessory after the fact in violation of 18 U.S.C. §3. It is well settled that jeopardy does not attach until a jury is empaneled and sworn in, or, in a bench trial, until the first witness is called. *Willhauck v. Flanagan,* 448 U.S. 1323, 1325-1326 (1980). There was no trial, evidence taken or plea of guilty with respect to the Louisiana conspiracy charge. Rather, the conspiracy count was dismissed. Thus, double jeopardy never attached to the Louisiana conspiracy charge.

Even if double jeopardy attached upon the filing of the original indictment in Louisiana, the Court does not believe that Count 1 of the present indictment violates the double jeopardy provision of the Fifth Amendment. The government may prosecute more than one conspiracy as long as it can show by a preponderance of the evidence that there exists more than one agreement. *United States v. Sinito,* 723 F.2d 1250, 1256 (6th Cir. 1983); *United States v. Jabara,* 644 F.2d 574, 576-577 (6th Cir. 1981). This Circuit has adopted a "totality of the circumstances" test for determining

whether a separate agreement and hence a separate conspiracy existed.

> The test requires the trial court . . . to consider the elements of: 1) time; 2) persons acting as co-conspirators; 3) the statutory offense charged in the indictment; 4) the overt acts charged by the government or any other description of the offenses charged which indicates the nature and scope of the activity which the government sought to punish in each case; and 5) places where the events alleged as part of the conspiracy took place. [cites omitted] Where several of these factors differ between the conspiracies, the conclusion follows that the alleged illegal conspiracies are separate and distinct offenses.

Sinito, supra at 1256-1257.

The evidence presented at the hearing indicates that the events in Louisiana and Ohio involved different co-conspirators. The only common co-conspirators were James Hager, Terry Hager and the defendant. (Tr. 7, 9-10-, 41-42).

Although the statutory offenses charged are the same, the overt acts committed in the course of the alleged conspiracies as well as the scope of the conspiracies are quite different. The Louisiana conspiracy is limited in time to one specific importation of marijuana into Louisiana in 1979 while the Ohio conspiracy alleges an on-going distribution network in Ohio between 1977 and 1984. (Tr. 40-41, 43-44).

Moreover, none of the overt acts alleged in the Ohio indictment occurred in Louisiana nor did the government's investigation of the present indictment involve acts committed in Louisiana. (Tr. 41, 48).

The defendant asks the Court to reconsider its decision not to grant him immunity. He maintains that had the Court granted immunity, he would have provided testimony which demonstrated that there was only one conspiracy. Specifically, he proffers that he would have testified that the marijuana he purchased in New Orleans was destined for distribution in Ohio.

The Court finds the defendant's argument unavailing for two reasons. First, the record reveals that defendant did not request immunity with respect to testimony related to the double jeopardy issue. (Tr. 52-53). Rather, defendant only raised the immunity issue in relation to his testimony concerning the plea agreement.

Secondly, and more importantly, even accepting the defendant's proffer, the Court believes the government has met its burden of showing that two separate conspiracies existed. The Louisiana indictment alleged a conspiracy to import marijuana into the United States via New Orleans and to distribute it to other regions of the country. (Tr. 28) The evidence shows that the defendant was initially charged with participating in the latter aspect of the conspiracy. His role was essentially that of a buyer.

In contrast, the Ohio indictment charges the defendant with organizing and supplying a mid-western

marijuana distribution network. This distribution network allegedly involved different co-conspirators, existed well before and well past the time at which the events alleged in the Louisiana indictment occurred, involved different overt acts and took place in an entirely different region of the country. The Court believes that these differences are sufficient to establish by a preponderance of the evidence that the alleged conspiracies were separate and distinct.

Whereas the Court finds that double jeopardy did not attach in this Louisiana case until the defendant pled guilty to the superseding bill of information and, furthermore, whereas the present indictment and the original Louisiana indictment allege separate conspiracies, defendant's motion to dismiss on double jeopardy grounds is **DENIED.**

The defendant also moves to dismiss the tax counts of the indictment on grounds of plea agreement violations. The Court notes that the defendant initially moved to dismiss the criminal narcotics and tax violations charged against him in the present indictment arguing that the charges are barred by the terms of his plea agreement entered into the Eastern District of Louisiana. The agreement states, in pertinent part:

> The Government also agrees that it will not charge the defendant with any other narcotics violations or criminal tax violations which he discloses which occurred in the Eastern District of Louisiana, before the date of this letter.

The defendant apparently now concedes that the above plea bargain agreement does not prohibit the government from bringing narcotics charges in the Southern District of Ohio. He does claim, however, that the "immunity" on tax charges is nationwide. (Tr. 59). The government maintains that the plain language of the plea agreement makes it clear that the government only offered immunity for tax violations which occurred in the Eastern District of Louisiana.

The parties offered conflicting testimony concerning statements made during the course of plea agreement negotiations. Mr. Al Winters, the Assistant United States Attorney in charge of the case in the East District of Louisiana testified that he had no intention to bind the government from bringing tax charges against the defendant in the Southern District of Ohio. (Tr. 15) He stated that he lacked such authority and if he had so intended, he would have included language which specifically bound the government. The defendant maintains that Winters had the authority to bind the government. The defendant testified and his counsel proffered testimony that the government bound not only local Internal Revenue Service charges but also all tax charges on a nationwide basis. (Tr. 57, 59)

There is no question that plea agreements are enforceable. *Santobello v. New York,* 404 U.S. 257 (1971). Nor does the Court believe that there is much doubt in this case of the authority of Mr. Winters to bind the government. *See United States v. Carter,* 454 F.2d 426, 428 (4th Cir. 1972). Rather, the issue here is whether the terms of the plea agreement bars charging the defendant with criminal tax law violations in the

Southern District of Ohio. After reviewing the agreement and considering the evidence before it, the Court concludes that it does not bar such charges.

In arriving at this conclusion, the Court observes that the written plea agreement unambiguously states that the government only agreed not to charge the defendant with criminal tax violations which occurred in the Eastern District of Louisiana. At the time the government made this promise, it was aware of the criminal drug investigations in the Southern District of Ohio and structured the plea agreement to insure that the plea agreement would not bind the government's prosecution of Del Rivo in this District. It did so by limiting the immunity to drug offenses occurring in the Eastern District of Louisiana. At the same time, it limited the immunity from criminal tax prosecutions to the same district. It is implausible that the same operative language which grants immunity only for drug offenses which occurred in the Eastern District of Louisiana does not likewise limit immunity for criminal tax violations occurring in the Eastern District of Louisiana. Nothing in Mr. Winters' testimony suggests that he made representations to the contrary. Although both the defendant and his counsel maintain that such representations were made, the Court is skeptical about such testimony which is contrary to the unambiguous, written terms of the plea agreement. Therefore, the Court finds no merit to defendant's motion to dismiss Counts 13, 15 and 16 of the indictment on grounds of plea agreement violations. Accordingly, defendant's motion is **DENIED.**

WHEREUPON, upon consideration and being duly informed, the Court finds defendant's motion to dismiss the indictment against him on grounds of double jeopardy and violation of the plea agreement is without merit and it is, therefore, **DENIED.**

IT IS SO ORDERED.

/s/ Joseph P. Kinneary
UNITED STATES DISTRICT JUDGE

[FILED Jun 13 2:45 PM '86]

UNITED STATES DISTRICT COURT
SOUTHERN OHIO DISTRICT
EASTERN DIVISION

FILED—KENNETH J. MURPHY CLERK
Jun 13 2:45 PM '86

Case No. CR-2-85-136(Z)

UNITED STATES OF AMERICA,

Plaintiff,

v.

UMBERTO DEL RIVO,

Defendant.

OPINION AND ORDER

This matter comes before the Court to consider defendant Umberto Del Rivo's petition to reconsider his motion to dismiss count 1 of the indictment for double jeopardy violation and his motion to dismiss the remaining counts for plea agreement violation. The Court denied these motions in its Opinion and Order dated June 2, 1986. The defendant petitions the Court to reconsider its decision based on the transcript of the plea he entered before the Honorable Fred J. Cassibry on October 17, 1984 in the Eastern District of Louisiana in Case Number 84-217. At the time this Court issued its Opinion and Order, said transcript had not been filed.

Defendant Del Rivo argues that the transcript of the plea reveals that he and co-defendant Hager assisted their co-conspirators in concealing the marijuana which was ultimately delivered to Ohio. He maintains that the factual basis underlying the plea to the superceding bill of information in the Eastern District of Louisiana clearly shows that he and co-defendant Hager were placed in jeopardy for the conspiracy charge.

The Court does not agree with this argument. First, the Court must reiterate that double jeopardy did not attach in the Louisiana proceeding until the plea on the superceding information was taken by Judge Cassibry. *See* Opinion and Order, p.2. Defendant Del Rivo pled guilty to one count of being an accessory after the fact. The present indictment charges him with conspiracy to possess and distribute marijuana. Whereas these are different crimes, there is no double jeopardy violation. Therefore, defendant's motion is **DENIED**.

In addition, the Court does not believe that Mr. Winters' testimony concerning the factual basis of the plea in Louisiana is significantly at variance with his testimony before this Court. The facts still indicate that different co-conspirators were involved and that different overt acts were committed in the course of the two alleged conspiracies. The only variance in Mr. Winters' testimony is his statement concerning the destination of the marijuana received by the defendant. He testified in the rearraignment proceeding before Judge Cassibry that the defendant received "approximately 15,000 pounds of the marijuana in the Ohio area," Rearraignment Proceedings, p. 18, while he testified in this Court that he deliberately refrained

from investigating any Ohio connections and that the factual basis in the Louisiana counts "involved possession with intent to distribute by other individuals in the New Orleans area," Tr. 31. Notwithstanding this incongruity and even assuming that the marijuana was received by Del Rivo in Ohio, the Court finds that the differences in co-conspirators and the overt acts alleged in the Louisiana and Ohio indictments establish the existence of separate conspiracies. Accordingly, the Court **AFFIRMS** its earlier decision denying defendant's motion to dismiss count 1 on double jeopardy grounds.

Defendant Del Rivo also argues that the transcript of October 17, 1984 buttresses his testimony as well as the proffered testimony of his attorney Alan I. Karten concerning representations made by Mr. Winters during the plea negotiations. After reviewing the transcript of the rearraignment proceedings, particularly page 15, the Court finds that Mr. Winters did nothing more than read and paraphrase the terms of the plea agreement. In so doing, he inadvertently left out reference to the Eastern District of Louisiana. In fact, the Court cannot ascertain from the transcript whether Mr. Winters actually failed to mention the limited nature of the drug and criminal tax immunity offered by the government or whether the court reporter neglected to record such references. In either case, the Court finds that the unambiguous terms of the plea agreement state that the government's offer of immunity was limited to drug and tax offenses committed in the Eastern District of Louisiana. Nothing said during the rearraignment proceeding changes this fact. Therefore, the Court

AFFIRMS it earlier decision denying Del Rivo's motion to dismiss the indictment for plea agreement violations.

WHEREUPON, upon consideration and being duly advised, the Court **AFFIRMS** its earlier Opinion and Order denying defendant Umberto Del Rivo's motion to dismiss the indictment for double jeopardy and plea agreement violations.

IT IS SO ORDERED.

/s/ [illegible]
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

D-06
DP8

INDICTMENT FOR VIOLATIONS OF THE FEDERAL CONTROLLED SUBSTANCES ACT

CRIMINAL DOCKET NO. 84-217

SECTION: J (Carr)

VIOLATIONS:

18 USC 2;
21 USC 841(a)(1);
21 USC 846

UNITED STATES OF AMERICA

versus

UMBERTO DELRIVO;
JAMES FREDERICK HAGER

The Grand Jury charges that:

COUNT 1

On or about June 1, 1979, and continuing thereafter up to and including on or about November 30, 1979, in the Eastern District of Louisiana, and elsewhere, UMBERTO DELRIVO and JAMES FREDERICK

HAGER did knowingly and intentionally combine, conspire, confederate, and agree with diverse other persons, known and unknown to the Grand Jury, to possess with intent to distribute approximately 15,000 pounds of marijuana, a Schedule 1 Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Section 846.

COUNT 2

On or about June 17, 1979, in the Eastern District of Louisiana, and elsewhere, UMBERTO DELRIVO and JAMES FREDERICK HAGER did knowingly and intentionally possess with intent to distribute approximately 15,000 pounds of marijuana, a Schedule 1 Controlled Substance; all in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

A TRUE BILL:

_____

F O R E M A N

/s/ John Volz

JOHN VOLZ
United States Attorney

/s/ Albert J. Winters, Jr.

ALBERT J. WINTERS, JR.
Trial Attorney
U.S. Department of Justice

/s/ Constantine D. Georges

CONSTANTINE D. GEORGES
Assistant U.S. Attorney

/s/ David J. Plavnicky

DAVID J. PLAVNICKY
Trial Attorney
U.S. Department of Justice

New Orleans, Louisiana
June 14, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. CR-2-85-136 (2)

Judge Kinneary

UNITED STATES OF AMERICA,

Plaintiff,

vs.

UMBERTO DEL RIVO, et al.,

Defendants.

MOTION TO DISMISS FOR PLEA AGREEMENT VIOLATION AND MEMORANDUM OF LAW IN SUPPORT THEREOF

The defendant, UMBERTO DEL RIVO, respectfully requests that this Court dismiss Counts One, Thirteen, Fifteen, and Sixteen of the indictment and as grounds therefor states:

1. The defendant is charged in Counts 1, 13, 15, and 16 of the indictment.

2. Count 1 charges conspiracy to possess with intent to distribute in excess of one thousands pounds of marijuana.

3. Counts 13 and 15 charge tax evasion for calendar years 1979 and 1980, respectively.

4. Count 16 charges a conspiracy to evade taxes.

5. On June 14, 1984, the defendant was charged by indictment filed in the United States District Court for the Eastern District of Louisiana with conspiracy to possess with intent to distribute marijuana, and possession with intent to distribute marijuana.

6. Pursuant to a plea agreement reduced to writing by letter of the U.S. Department of Justice dated October 17, 1984, and attached hereto as Exhibit 1, the defendant entered a plea of guilty to the charges filed in Louisiana. A judgment of conviction was entered.

7. In exchange for his plea and cooperation, the United States Government agreed that the defendant would not be charged with any other narcotics or criminal tax violations which the defendant disclosed.

8. The defendant complied with the plea agreement and disclosed the narcotics and tax violations which comprise the indictment in this case. Therefore, the instant charges are barred by the plea agreement.

WHEREFORE, the defendant requests that the charges be dismissed.

MEMORANDUM OF LAW

The seminal case of *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), is generally

the starting point for any analysis of an alleged breach by the government of a plea bargain agreement. Indeed, the opening sentence in the plea agreement letter in this case, attached as Exhibit 1, cites *Bryan v. United States*, 492 F.2d 775 (5th Cir. 1974), in which the Fifth Circuit set forth the procedures for plea bargains in the wake of *Santobello*.

In *Santobello*, the Supreme Court recognized that representations made by the government in plea bargain proceedings are enforceable. In *Santobello*, the prosecuting attorney failed to carry out a promise made by his predecessor to the defendant not to make a recommendation as to sentence to the judge. The Supreme Court remanded to the state court either to resentence before a different judge or to allow the defendant to withdraw his guilty plea. The basis for the reversal was three-fold: (1) plea bargaining is a desirable and essential component of the prompt and efficient administration of justice and should be encouraged; (2) the process must be attended by safeguards in recognition of the duties of the prosecution to ensure to the defendant what is reasonably due him under the circumstances, and that where a promise is a significant part of an inducement to plead guilty the promise must be fulfilled; and (3) there is an adjudicative element inherent in the acceptance or rejection of a plea of guilty.

There are at least two reported decisions that in applying the reasoning of *Santobello* have approved the dismissal of indictments based upon facts similar to those in the case at bar. In *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972) (en banc), *cert. denied*, 417 U.S. 933, 94 S.Ct. 2646, 41 L.Ed.2d 237 (1974), and *United*

States v. Paiva, 294 F.Supp. 742 (D.D.C. 1969), the courts enforced unauthorized promises by dismissing federal indictments brought against the defendants to whom the promises were made. In both cases, the promises were part of the plea bargaining process resulting from which the defendants pled guilty. Highly significant to the case *sub judice* is that in *Carter*, the court enforced a promise made by an Assistant United Staes Attorney in one district not to bring certain charges by dismissing those charges when they were brought in another district. *See also United States v. Minnesota Min. & Mfg. Co.*, 551 F.2 1106 (8th Cir. 1976) (district court properly dismissed indictment based upon prosecutorial agreement not to prosecute). The reasoning of *Carter* applies with equal force to the case at bar:

> Sound reasons of public policy support this result. Many federal crimes have multistate ramifications and are committed by persons acting in concert. If we hypothesize a single defendant charged with the interstate transportation of a stolen motor vehicle through several states, we would not question that the efficient administration of justice would support the authority of the prosecutor in one of those states to obtain an indictment and bargain for a guilty plea, agreeing that all offenses in the other jurisdictions would be disposed of in the single case. If there is added to the hypothetical codefendants and, if the plea bargain includes a promise of cooperation in their disclosure and/or their prosecution, the

> desirability of the result we reach becomes more apparent. A contrary result would constitute a strong deterrent to the willingness of defendants accused of multistate crimes to cooperate in speedy disposition of their cases and in apprehending and prosecuting codefendants.
>
> If there be fear that an United States Attorney may unreasonably bargain away the government's right and duty to prosecute, the solution lies in the administrative controls which the Attorney General of the United States may promulgate to regulate and control the conduct of cases by the United States Attorney and their assistants. The solution does not lie in formalisms about the express, implied or apparent authority of one United States Attorney, or his representative, to bind another United States Attorney and thus to visit a sixteen year sentence on a defendant in violation of a bargain he fully performed. There is more at stake than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government.

454 F.2d at 428.

Defendant DEL RIVO fully performed his part of the bargain. He is entitled to dismissal of the charges in this case based upon the plea agreement letter dated

October 17, 1984, from the United States Department of Justice, which provides in pertinent part:

> This plea bargain agreement is predicated upon the fact that the defendant agrees to submit to debriefing on October 17, 1984, by Special Agents of the Government and Department of Justice attorneys investigating criminal matters. The defendant understands that he must be truthful and candid in the debriefing. This debriefing will include any knowledge the defendant has of narcotics or other criminal activity in the New Orleans, Louisiana, area. The defendant also agrees to appear before any grand jury and at any trial in the Eastern District of Louisiana and testify completely and truthfully to the contents of the aforementioned debriefing.
>
> The Government also agrees that any statements or testimony given by the defendant pursuant to questions asked by federal agents or prosecutors after October 17, 1984, and, as a result of this agreement, will not be used against him, nor will anything derived from his statements . . .

The sentence which follows in the letter gives rise to the basis for dismissal of the Ohio indictment:

> The Government also agrees that it will not charge the defendant with any other narcotics violations or criminal tax violations which he

discloses which occurred in the Eastern District of Louisiana, before the date of this Letter.

Defendant DEL RIVO complied with the terms of the plea agreement and accordingly pled guilty and was sentenced. He disclosed to the government the narcotics and tax violations that are the subject of the Ohio indictment which violations "occurred in the Eastern District of Louisiana" because the importation and distribution point was Louisiana. The defendant and the parties agreed and understood the plea agreement to mean that no narcotics or tax charges arising out of the conspiracy which imported marijuana into Louisiana for distribution to Ohio and elsewhere would be filed anywhere by the United States Government. Because the Ohio indictment charges DEL RIVO with marijuana and tax violations arising out of the Louisiana importation, and because the Ohio conspiracy is the same conspiracy that was the subject of the plea agreement in Louisiana, and because the Ohio charges involving the defendant pre-date the plea agreement letter, dismissal is mandated to comply with the plea agreement. *Carter, supra.*

It matters not whether the promise underlying the plea agreement was fulfillable. *Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286, 296 (2d Cir. 1976). Moreover, fundamental fairness and public confidence in government officials require that prosecutors be held to "meticulous standards of both promise and performance." *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973); *Palermo, supra.* Thus, the court in *Palermo* noted:

> [T]he courts have afforded relief where prosecutors have made specific sentencing promises which were unfulfillable, since sentencing lies totally within the court's discretion, *United States v. I.H. Hammerman II*, 528 F.2d 326 (4th Cir. 1975); *Harris v. Superintendent, Va. State Penitentiary*, 518 F.2d 1173 (4th Cir. 1975; *Correale v. United States, supra*, or where one federal prosecutor promised immunity from federal prosecution outside his own jurisdiction. *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972) (en banc), *cert. denied*, 417 U.S. 933, S.Ct. 2646, 41 L.Ed.2d 237 (1974). *Geisser v. United States*, 513 F.2d 862 (5th Cir. 1975) involved breach of a Department of Justice plea bargain which entailed, in part, a promise of parole after three years imprisonment. On appeal, the Department argued that the district court usurped the exclusive power of the Parole Board by ordering release. The Court of Appeals, although it remanded the case for a determination of what the Parole Board would do when informed of the bargain, concluded that such a bargain "fits well within the realm of enforceable constitutional rights . . .." 513 F.2d at 869 n.11. We agree and hold that where a defendant pleads guilty because he reasonably relies on promises by the prosecutors which are in fact unfulfillable, he has a right to have those promises fulfilled.

545 F.2d at 296.

The same reasoning applies here. The defendant pled guilty and was debriefed in Louisiana upon the understanding that no further charges arising out of that marijuana importation conspiracy would be filed against him anywhere, notwithstanding any legalistic, formalistic, or contractual analysis to the contrary. Strict application of contract law principles can be of assistance, but is not dispositive because constitutional protections are implicated in broken plea agreements and the element of unfairness, lacking in contract law, can be a basis for resolving such an issue in favor of the defendant.

The lodging of charges against the defendant and arising out of the same conspiracy charged in Louisiana is unfair and violative of the government's promise.

WHEREFORE, the defendant respectfully requests that the Court enter an order of dismissal as to DEL RIVO of Counts One, Thirteen, Fifteen, and Sixteen of the indictment.

Respectfully submitted,

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(305) 448-7200

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PAUL MORRIS
2600 Douglas Road
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Coral Gables, Fl. 33134
(305) 446-2020

/s/ Paul Morris
PAUL MORRIS

Counsel for Umberto Del Rivo

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed to Robin Jones, Assistant U.S. Attorney, U.S. Courthouse, Room 200, 85 Marconi Blvd., Columbus, Ohio 43215, this 21st day of February, 1986.

/s/ Paul Morris

JOINT EXHIBIT #2

U.S. Department of Justice
NEW ORLEANS STRIKE FORCE
Hale Boggs Federal Building
500 Camp Street, Room 308
New Orleans, LA 70130
Telephone: (504) 589-3801

(Seal)
A-134
AJW

October 17, 1984

Honorable Fred J. Cassibry
United States District Judge
Eastern District of Louisiana
500 Camp Street, Room C-466
New Orleans, LA 70130

Re: United States v. Umberto Delrivo
Criminal Docket No. 84-217 "J" ("FJC")

Dear Judge Cassibry:

In compliance with the holding of *Bryan v. United States*, 492 F.2d 775 (5th Cir. 1974), and Rule 11(e)(1)(C), F.R.Cr.P., the United States of America wishes to acknowledge the following agreement with the defendant, Umberto Delrivo, through his attorney.

The defendant, Umberto Delrivo, is presently charged in a two-count indictment charging violations

of the Federal Controlled Substances Act. The Government agrees to file in open court, after a waiver of grand jury indictment, a one-count superseding bill of information, charging a violation of Title 18, United States Code, Section 3, accessory after the fact. Should the Court accept the defendant's plea of guilty to the superseding bill of information, the Government further agrees to move to dismiss the original indictment at the time of sentencing.

This plea bargain agreement is predicated upon the fact that the defendant agrees to submit to debriefing on October 17, 1984, by Special Agents of the Government and Department of Justice attorneys investigating criminal matters. The defendant understands that he must be truthful and candid in the debriefing. This debriefing will include any knowledge the defendant has of narcotics or other criminal activity in the New Orleans, Louisiana, area. The defendant also agrees to appear before any grand jury and at any trial in the Eastern District of Louisiana and testify completely and truthfully to the contents of the aforementioned debriefing.

The Government also agrees that any statements or testimony given by the defendant pursuant to questions asked by federal agents or prosecutors after October 17, 1984, and, as a result of this agreement, will not be used against him, nor will anything derived from his statements or testimony be used against him. However, all parties understand that any statements or testimony given by the defendant can be used for leads or for any other reasons against other persons. Further, the defendant fully understands that should

he commit perjury or give false statements to federal agents, the statements and testimony can be used against him and he faces additional criminal charges involving said false statements and/or perjury.

The Government also agrees that it will not charge the defendant with any other narcotics violations or criminal tax violations which he discloses which occurred in the Eastern District of Louisiana, before the date of this letter. However, if the defendant withholds any of his narcotics involvement or any other criminal activities during any and all debriefings or appearances as a witness, the Government, or other appropriate authority, has the right to charge him with those violations.

This agreement in no way affects the Government's right to proceed civilly against the defendant in matters under jurisdiction of the Internal Revenue Service or pursuing any other civil litigation under the laws of the United States. The Government also agrees to recommend to the Court that the defendant receive a sentence of six months. This is the amount of time that other defendants with a role similar to Mr. Delrivo have received in the past. The Court has agreed to accept the Government's recommendation and sentence the defendant to that period of incarceration. Further, the Government takes no position with regards to the institution where the defendant will have to serve his sentence and leaves that entirely to the discretion of the Court and the Bureau of Prisons.

Finally, with regards to the starting date of the period of incarceration, the Government has no objection to the defendant beginning it after January 1, 1985.

The above constitutes the entire plea bargain agreement in this matter.

FOR THE GOVERNMENT:

/s/ Albert J. Winters, Jr.
ALBERT J. WINTERS, JR.
Chief, New Orleans Strike Force
U.S. Department of Justice

FOR THE DEFENSE:

/s/ Umberto DelRivo
UMBERTO DELRIVO
Defendant

/s/ Alan I. Karten
ALAN I. KARTEN
Defense Counsel

MICHAEL ELLIS
Defense Counsel

[CLERK'S SEAL MAR 2, 1986
Anita Kinghorn
Deputy Clerk, U.S. District Court
Eastern District of Louisiana
New Orleans, La.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CRIMINAL DOCKET NO: 84-217

SECTION: "J"

UNITED STATES OF AMERICA

versus

JAMES FREDERICK HAGER

GOVERNMENT'S RESPONSE AND INCORPORATED MEMORANDUM OF LAW TO DEFENDANT'S MOTION FOR A BILL OF PARTICULARS

NOW INTO COURT, through the undersigned Government Attorneys, comes the United States of America and responds to defendant James Frederick Hager's motion for a bill of particulars as follows:

I. AS TO COUNT ONE OF THE INDICTMENT

A. The State of Ohio.

B. George Gowen, Donald Koehl, Donald Segura, Russell Janes, Marion Ernest, Ted Sudderth, Emberto Delrivo, Gregory Nick, and John Hirschler.

C. The specific dates that defendants Emberto Delrivo and James Frederick Hager engaged in overt

acts in furtherance of the conspiracy charged herein are unknown at this time. See Count II of the instant indictment.

II. AS TO COUNT TWO OF THE INDICTMENT

A. The State of Ohio.

B. Unknown to the Government at this time.

WHEREFORE, the Government prays that its answer be deemed good and sufficient in law and that it be relieved from further answering.

New Orleans, Louisiana, this 20 day of July, 1984.

Respectfully submitted,

JOHN VOLZ
UNITED STATES ATTORNEY

/s/ Albert J. Winters, Jr.

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/s/ Constantine D. Georges

CONSTANTINE D. GEORGES
Assistant U. S. Attorney

(2)

No. 87-292

Supreme Court, U.S.
FILED
OCT 15 1987
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1987

UMBERTO DEL RIVO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

13 pp

QUESTION PRESENTED

Whether petitioner may take an interlocutory appeal from an order denying his motion to dismiss an indictment on the ground that a prior plea agreement should be interpreted as a bar to the prosecution.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-292

UMBERTO DEL RIVO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-6) and the memorandum opinions of the district court (Pet. App. 8-19) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1987. A petition for rehearing was denied on July 1, 1987 (Pet. App. 7), and the petition for a writ of certiorari was filed on August 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 14, 1984, petitioner was indicted by a grand jury sitting in the Eastern District of Louisiana. He was charged with one count of possessing marijuana with intent to distribute it and one count of conspiring to commit that offense (21 U.S.C. 841(a)(1), 846). Pursuant to a plea agreement, those charges were dismissed, and petitioner pleaded guilty to an information charging him with being an accessory after the fact (18 U.S.C. 3). He was

sentenced to six months' imprisonment. Under his plea agreement, petitioner agreed to provide information about the marijuana distribution scheme and other criminal activity in the New Orleans area. He also agreed to testify before a grand jury or at trial. In return, the government agreed not to use that information against petitioner unless petitioner committed perjury. The government also agreed not to charge petitioner with drug or income tax violations in the Eastern District of Louisiana for activity preceding the agreement of October 17, 1984 (Pet. App. 33-35).

On December 19, 1985, petitioner was indicted in the United States District Court for the Southern District of Ohio on one count of conspiring to possess marijuana with intent to distribute it (21 U.S.C. 841(a)(1)), two counts of income tax evasion (26 U.S.C. 7201), and one count of conspiracy to defraud the United States by failing to provide accurate information to the Internal Revenue Service (18 U.S.C. 371). Before trial, petitioner moved to dismiss those charges, claiming that they violated his rights under the Double Jeopardy Clause and contravened his plea agreement in the Eastern District of Louisiana.

The district court conducted an evidentiary hearing, at which the prosecutor from the Eastern District of Louisiana testified. The court then ruled against petitioner, denying both motions (Pet. App. 8-19). The court found that jeopardy never attached on the Louisiana marijuana conspiracy charges, so the new indictment did not violate the Double Jeopardy Clause (Pet. App. 9). In addition, the court determined that the two marijuana conspiracy charges were different, because the new indictment involved events in Ohio only, while the Louisiana federal indictment charged a single importation into Louisiana (*id.* at 9-12, 17-18). The district court likewise rejected petitioner's contention that his Louisiana federal plea agreement barred the present tax charges. The court found that

the agreement was unambiguous and bound the government only in the Eastern District of Louisiana, so that the charges in the Southern District of Ohio were not affected by the agreement (*id.* at 12-14, 18-19).[1]

2. In an unpublished opinion, the court of appeals affirmed on the double jeopardy claim and dismissed the appeal on the claim that the new indictment violated petitioner's earlier plea agreement (Pet. App. 3-6). The court of appeals agreed with the district court that petitioner had no double jeopardy claim on the marijuana charges, because jeopardy never attached to those charges in his earlier prosecution (*id.* at 4). With respect to petitioner's claims about the plea agreement, the court of appeals held that it lacked jurisdiction over petitioner's claims because there was no final judgment (*id.* at 5-6). Relying on its previous decision in *John Doe Corp.* v. *United States*, 714 F.2d 604, 606 (6th Cir. 1983), the court held that a claim of violation of a plea agreement did not constitute an exception to the final judgment rule and was not a matter that could be presented on interlocutory appeal from a pretrial ruling in a criminal case. Pet. App. 5-6.[2]

ARGUMENT

Petitioner raises no double jeopardy issues here; rather, his only challenge (Pet. 3-9) is to the decision of the court of appeals that his claim of violation of a prior plea agreement is not a proper subject for interlocutory appeal.

---

[1] The district court was later provided the transcript of petitioner's guilty plea proceeding in the Eastern District of Louisiana. The court adhered to its rulings after reviewing that transcript. Pet. App. 16-19.

[2] The court of appeals denied rehearing and rehearing en banc on July 1, 1987 (Pet. App. 7). On July 14, 1987, petitioner sought a stay of mandate from the court of appeals. On August 13, 1987, the court of appeals denied a stay of mandate. The mandate issued on August 18, 1987. Petitioner has not sought a stay from this Court. Trial has been scheduled for October 26, 1987.

The decision of the court of appeals on that point, however, is correct and is compelled by binding precedent of this Court. At least four other courts of appeals have reached the same result. Although one court of appeals (the Second Circuit) has reached a contrary result in decisions rendered in 1976 and 1985, we submit that the conflict in the circuits is not one that merits resolution by this Court, given the infrequency with which the issue arises, the existence of binding precedent from this Court, and the substantial indications that the Second Circuit might reconsider its unique rule in an appropriate case.

1. This case is controlled by *Heike* v. *United States*, 217 U.S. 423 (1910). In that case, the defendant claimed that a statute granted him immunity from prosecution, and he sought to appeal, before trial, a ruling of the trial court rejecting his contention. This Court unanimously held that no interlocutory appeal could be taken. The Court explicitly rejected the argument "that this judgment must be held to be final for the purpose of review, otherwise the Government cannot keep the contract of immunity which it has made with the accused" (217 U.S. at 430); reversal of any final judgment of conviction, this Court held, would be sufficient to protect the defendant's interests if his claim of immunity from prosecution was correct (*id.* at 430-433).

Petitioner's argument (see Pet. 6) amounts to nothing more than the same argument that was rejected in *Heike*—that he has a "contract of immunity" with the government that requires pretrial vindication if it is to be vindicated at all. That argument is no more compelling in this case than it was in *Heike:* reversal of a conviction would vindicate petitioner's interests if his underlying contention were correct, and acquittal or other favorable termination of petitioner's criminal charges in the trial court would avert the necessity of reviewing that contention. To

be sure, this case involves a plea agreement made specifically between the government and petitioner, whereas *Heike* involved a statutory grant of immunity to all persons in a defined class, but that distinction makes no difference in the analysis. Both the plea agreement in this case and the statute in *Heike* are "contracts" binding on the government, and both would have resulted in pretrial termination of the prosecution if the trial court had agreed with the defendant's contention. There is no distinction between the two situations that would justify granting petitioner a right to interlocutory appeal that was denied to the defendant in *Heike*.

In the 1970s, as the rule allowing appeal from denials of double jeopardy claims developed (see *Abney* v. *United States*, 431 U.S. 651, 657 (1977) (affirming that rule and collecting cases)), a question arose whether the principles of *Heike* remained valid. In *United States* v. *Alessi*, 536 F.2d 978 (1976) (*Alessi I*), the Second Circuit did not even cite *Heike* in the course of holding that, by analogy to double jeopardy claims, claims of government breach of a plea agreement could be the subject of an interlocutory appeal.[3]

Just one year after *Abney*, however, this Court reaffirmed the continuing vitality of *Heike*. In *United States* v. *MacDonald*, 435 U.S 850, 860 (1978), the Court unanimously rejected the "superficial[ly] attracti[ve] * * * argument" that all claims that would result in dismissal of the indictment must, like double jeopardy claims, be presentable on interlocutory appeal. See also *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 268-270

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[3] In a later chapter of the same litigation, however, a different panel of the Second Circuit (per Judge Friendly), citing *Heike*, indicated that it disagreed with the prior panel as to appealability. *United States* v. *Alessi*, 544 F.2d 1139, 1143-1152, cert. denied, 429 U.S. 960 (1976) (*Alessi III*); see 544 F.2d at 1152 ("[i]f the point were open in this circuit, we would cast our lot in favor of the continuing vitality of *Heike*").

(1982) (per curiam). As an explicit example of nonappealable orders, this Court, citing *Heike,* wrote: "Dismissal of the indictment is the proper sanction when a defendant has been granted immunity from prosecution * * *. Obviously, however, this has not led the Court to conclude that such defendants can pursue interlocutory appeals." 435 U.S. at 860 n.7.

In light of *MacDonald's* explicit reaffirmance of *Heike* (see also *Flanagan* v. *United States,* 465 U.S. 259, 270 (1984)), there is no basis to maintain that interlocutory appeal is proper in this case. Petitioner's rights under the plea agreement are not, as he maintains, analogous to double jeopardy rights that will be lost if not vindicated before trial, but rather are precisely equivalent to the rights of the defendant in *Heike;* the possibility of vindication on appeal from a final judgment is sufficient to protect petitioner's rights.[4]

2. Although the courts of appeals often fail to cite *Heike,* all but one of the courts of appeals that have addressed the issue presented by this case have reached the result that *Heike* compels, holding that pretrial denials of motions to dismiss based on prior plea agreements are not immediately appealable. See *John Doe Corp.* v. *United States,* 714 F.2d at 606; *United States* v. *Bird,* 709 F.2d 388, 392 (5th Cir. 1983); *United States* v. *Rosario,* 677 F.2d 614, 615 n.4 (7th Cir.), cert. denied, 459 U.S. 867 (1982); *United States* v. *Eggert,* 624 F.2d 973, 975-976

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[4] As the Fifth Circuit observed in *United States* v. *Bird,* 709 F.2d 388 (1983), in rejecting an argument identical to petitioner's, a defendant's rights under a plea agreement are not equivalent to a right not to be tried. "It is not enough that an eventual conviction would be invalid. Ms. Bird's asserted right fails this test. Her plea that the agreement bars her prosecution can be fully vindicated, if appropriate, in an appeal from any conviction the government obtains in her case. While the agreement is phrased in terms of nonprosecution, its essence is a promise of immunity. Her immunity from punishment will not be lost simply because she is forced to stand trial." 709 F.2d at 392.

(10th Cir. 1980); *United States* v. *Solano*, 605 F.2d 1141, 1142-1143 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); see also *United States* v. *Brizendine*, 659 F.2d 215 (D.C. Cir. 1981); cf. *United States* v. *Levine*, 658 F.2d 113, 127 (3d Cir. 1981) (in discussion of appealability of a different kind of order, noting "[t]he continuing vitality of *Heike*").

Standing against this weight of authority are the Second Circuit's decisions in *Alessi I* and *United States* v. *Abbamonte*, 759 F.2d 1065, 1070-1071 (1985), that a defendant may take an interlocutory appeal when he claims that a prior plea agreement bars the government from bringing the charges alleged. For several reasons, we do not think it is necessary for this Court to resolve the conflict between the Second Circuit and the other circuits that have considered the issue.

First, this issue arises infrequently. Even in the Second Circuit, we know of no defendant other than the defendants in *Alessi* and *Abbamonte* who has called on the Second Circuit to decide, on an interlocutory basis, a claim of breach of a plea agreement—despite the passage of nine years between *Alessi I* and *Abbamonte*, and another two years since *Abbamonte*.

Second, both the *Alessi I* panel and the *Abbamonte* panel failed to cite *Heike*, even though, as Judge Friendly noted in *Alessi III*, *Heike* seems to compel the opposite result (see note 3, *supra*). Although the *Abbamonte* decision was rendered after this Court reaffirmed *Heike* in *MacDonald*, the *Abbamonte* panel failed to note the pertinent language from *MacDonald*. We trust that, in a future case, a Second Circuit panel that is made aware of *Heike* and its reaffirmance in *MacDonald* will give serious consideration to our contention that *Heike* is controlling and will reconsider the jurisdictional portions of the decisions in *Abbamonte* and *Alessi*.

Third, there are other indications that the Second Circuit might reconsider its unique rule in an appropriate case. In *Alessi III*, the panel disagreed with *Alessi I* but explicitly indicated that it failed to call for en banc reconsideration of *Alessi I* because, among other things, "as in * * * *Alessi I*, [the court] agree[d] with the Government on the merits" (544 F.2d at 1143). Likewise, in *Abbamonte*, the panel considered itself "obliged to follow the holding on appealability in *Alessi*" (759 F.2d at 1071) but then ruled for the government on the merits (*id.* at 1072). *Abbamonte* thus represents only adherence to, not independent endorsement of, a decision that some members of the Second Circuit had already declared was wrongly decided and merited en banc reconsideration.[5] There was, of course, no occasion for the government to seek such reconsideration in *Abbamonte* because the government prevailed on the merits. Indeed, the fact that the defendants in both *Alessi* and *Abbamonte* have failed on the merits of their claims means that *no* defendant has ever in fact benefited (except by delaying trial) from the *Alessi/Abbamonte* rule.

In sum, we recognize the conflict in the circuits, but we submit that it is one that this Court does not need to resolve at this time, and may never need to resolve.

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[5] Indeed, the *Abbamonte* court's uncertainty about the *Alessi* holding may be reflected in the fact that the court thought it appropriate to comment on an "arguably available" independent basis – pendent jurisdiction – for reaching the merits of the defendant's claim of breach of a plea agreement (759 F.2d at 1071 n.3).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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OCTOBER 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987 — 202-037/60067